

1992

# State of Utah v. Alfred Lee O'Neil : Brief of Appellant

Utah Court of Appeals

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William L. Schultz; Attorney for Appellant.

Attorney General, State of Utah .

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
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DOCKET NO.

920439

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

STATE OF UTAH )

Plaintiff and Appellee, )

v. )

Case Number 920439 CA

ALFRED LEE O'NEIL )

Defendant and Appellant )

BRIEF OF DEFENDANT-APPELLANT

Appeal from the conviction of three counts of Distribution of a Controlled Substance in the Seventh District Court, Grand County, Judge Boyd Bunnell.

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ARGUMENT PRIORITY (2)

FILED

SEP 14 1992

COURT OF APPEALS

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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STATE OF UTAH )

Plaintiff and Appellee, )

v. )

Case Number 920439 CA

ALFRED LEE O'NEIL )

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ARGUMENT PRIORITY (2)

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STATEMENT SHOWING JURISDICTION OF THE COURT OF APPEALS

This is an appeal from a conviction of three counts of Distribution of a Controlled substance under Section 58-37-8 (1) (a), Utah Code Annotated, as amended. Each count is a First Degree Felony. Jurisdiction vests in this Court pursuant to Rule 26, Utah Rules of Criminal Procedure and Section 78-2-2 Utah Code Annotated, 1953 as amended. This Appeal has been referred to the Court of Appeals by the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL.  
STANDARD OF REVIEW.

Evidence of Defendant's prior criminal record was impermissibly introduced into evidence, contrary to Rules 403, 404, and 609 of Utah Rules of Evidence. The Standard of Review is "Abuse of Discretion." State v. Hamilton, 827 P.2d 232 (Utah 1992)

The favorable ruling of the original trial judge to exclude prior convictions was improperly overruled. Standard of Review is "Abuse of Discretion." Hamilton supra

The original trial judge should not have been reassigned.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES, ORDINANCES, AND RULES

Utah Rules of Evidence, 403, 404, and 609

Utah Rules of Criminal Procedure 29 and 29A

CODE OF JUDICIAL ADMINISTRATION

3-104(E) (ii)  
4-604

Set forth verbatim in addendum.

STATEMENT OF THE CASE

A. NATURE OF CASE

Defendant Lee O'Neil was charged by Information with Distribution of a Controlled Substance in violation of Section 58-37-8 U.C.A, in the Seventh District Court in and for Grand County, State of Utah, for Acts allegedly occurring on December 6, 10 and 12, 1990. Originally Defendant had two co-Defendants, his wife Peggy O'Neil and Steven Taylor. The crimes were enhanced to first degree felonies.

B. COURSE OF PROCEEDINGS

The charges against Mr. Taylor were dropped at preliminary hearing. The consolidated trials of the O'Neils commenced on October 28, 1991 before the Honorable Bruce K. Halliday. (R-98) Prior to that trial Defendants' counsel filed a Motion in Limine to exclude testimony by the state referring to either Defendant's prior convictions or alleged prior crimes, wrongs or bad acts. (R 67). Judge Halliday granted Defendants' Motion (R-99).

On October 29, 1991 Defendant Peggy O'Neil was found guilty. The jury was unable to reach an unanimous decision on Mr. O'Neil and a mistrial was declared (R 103-4). A new trial date was set

for Mr. O'Neil on the November 12, 1991 Law and Motion Calendar.

On November 15, 1991 the state filed its own Motion in Limine Relating to Prior Bad Acts and Convictions and Statement of Points and Authorities. (R 106). The Motion sought to introduce evidence of a Judgment and Commitment of Mr. O'Neil for Distribution of a Controlled Substance on December 30, 1986 (R. 106-7; Ex7), and a Judgment and Order of Probation against Peggy O'Neil for a January 7, 1987 Attempted Distribution of a Controlled Substance. (R 107; Ex 8). Defendant filed his responses brief (R-120). In a Statement of Reply Point (R. 129), the State (at R.130) acknowledged Judge Halliday's prior ruling against the admission of such evidence.

At a December 9, 1991 the State's Motion in Limine was heard before the Honorable Boyd Bunnell. No explanation was proffered for Judge Bunnell's replacement of Judge Halliday. In Finding of Fact and Conclusions of Law (R-153-8) and in an Order Granting Motion in Limine (R-159-60), Judge Bunnell reversed Judge Halliday and ruled the prior convictions of both Lee and Peggy O'Neil admissible at O'Neil's second trial.

Prior to O'Neil's second trial on February 27, 28, 1991 Defendant filed his objection to the matter proceeding before Judge Bunnell and moved to disqualify him to and proceed before Judge Halliday (R 171.). That Motion was denied in a February 5 Ruling by Judge Bunnell which states a scheduling conflict for Judge Halliday (R 186-7).

At Defendant's second trial the State made reference to the



earlier distribution charges and pleas of both Lee and Peggy O'Neil (Tr. 55). A Witness for the State mentioned Lee O'Neil's doing time in prison. (Tr 211). Exhibits 7 and 8, consisting of the Informations and Judgments of Lee and Peggy O'Neil were introduced and presented to the jury over Defendant's objection (Tr 197-8).

#### C. DISPOSITION AT TRIAL COURT

Defendant was found guilty of all three counts by the jury (R 297-8). On April 13, 1992 he was sentenced to three consecutive terms of five years to life at the Utah State Prison.

#### SUMMARY OF ARGUMENT

It was reversible error to allow evidence of Defendant's prior bad acts or convictions into evidence. After a mistrial, the original trial judge who had ruled favorably on Defendant's Motion in Limine to Suppress the introduction of such evidence should not have been reassigned. The new district court judge did not have power to reverse the first trial judge's ruling. Such reassignment and overruling argument constitute reversible error.

#### ARGUMENT

##### I. EVIDENCE OF DEFENDANT'S PRIOR CONVICTION

The Utah Rules of Evidence set guidelines for the admission of evidence of the prior bad acts or criminal convictions of defendants. Rule 404 U.R.E. states that evidence of a person's character is not admissible to show that he acted in conformity therewith. Subsection (b) of Rule 404 requires that

for the evidence of specific acts to be admissible, it must have some purpose other than proof that the charges against the Defendant are consistent with his character, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

State v. Hamilton, 827 P.2d 232, (Utah 1992).

The Introduction of evidence of a prior crime is further regulated by Rule 609 of the Utah Rules of Evidence, which allows such evidence solely for the purpose of attacking the credibility of a witness and then only if it was elicited from the witness or established by public record during cross examination.

Both of the above rules are further regulated by Rule 403 of the Utah Rules of Evidence that excluded evidence otherwise admissible if there is the likelihood it will be unfairly prejudicial.

In the instant case, if the probative value of the prior bad acts is weighed against the danger of unfair prejudice, this Court must find that the admission was not proper and that the same was prejudicial error and not harmless.

The state case against Defendant was very weak. Defendant did not commit any acts of handling or passing drugs or handling or passing money. The only theory on which he could be found culpable of a crime is one of accomplice liability. His acts which supposedly intentionally aided or assisted another Co-Defendant commit a crime were solely in driving her to locations where she subsequently had a drug transaction with a confidential

informant. On one occasion Defendant did not even exit the vehicle, but remained in it while his wife went to visit briefly with a friend (R 71; 206) (See generally the direct and cross-examinations of Philip Hanvey, Mike Bradford, Ron Richmond)

That State acknowledged this minimal involvement of Defendant and recognized the need to impugn Defendant's character as early as its opening remarks.

We will show that Lee O'Neil assisted his wife in selling the drugs by acting, if nothing more, as a chauffeur to bring her to her distribution point; . . . some of that evidence is--is this, that both Lee and Peggy O'Neil were charged with distributing cocaine back in 1986, the end of December '86 or January '87, the Defendant, eventually pled guilty to that charge. Peggy O'Neil pled guilty to a reduced offense in exchange for admissible of the larger offense. (TR-54-5)

Indeed, the State's case against Defendant was so weak that the state felt it necessary to introduce evidence of alleged subsequent bad acts of Defendant, after a lengthy discussion with the court and over the objection of Defendant (Tr. 87-105). The need for the introduction of evidence of things that supposedly occurred in February 1992 to prove charges on conduct occurring in December 1991 can only highlight the fact that the introduction of bad acts is prejudicial and not harmless.

The Utah Supreme Court has reviewed a similar case in which

Defendant appealed the introduction of prior convictions during the guilt phase of his trial. In State v. Florez, 777 P.2d 452 (Utah 1989). Although the court held in that case that the evidence was relevant and admissible to prove an element of the crime, it reiterated that such evidence was not admissible solely to show Defendant's propensity to commit crime, at 456, citing State v. Pacheco, 712 P.2d 192, 195 (Utah 1985) cert denied 479 U.S. 813; State v. Shaffer, 725 P.2d 1301, 1307 (Utah 1986); and State v. Saunders, 699 P2d 738, 741 (Utah 1985). In holding that the prior convictions were inadmissible on other grounds, the Supreme Court in considering Rule 30(a) Utah Rules of Criminal Procedure and Utah Rule of Evidence 103(a) held that such error would warrant reversal only with the reasonable likelihood of a more favorable result for defendant, at 458, citations omitted.

In this case the likelihood of a more favorable result certainly exists, considering the other weaknesses of the state's case.

See also State v. Banner, 717 P2d 1325 (Utah 1986), stating that in a Rule 609, consideration "It is universally held that the prosecution . . . has the burden of persuading the court that the probative value of admitting the convictions, as far as shedding light on the Defendant's credibility, outweighs the prejudicial effect to the Defendant." at 1334.

The protections afforded all criminal defendants by the above Rules of Evidence and the Utah and United States Constitutions were irreparably violated by the opening statement,

the comments of states witness Pam Laxton about Defendant serving time in prison, (TR-211), and by the introduction of Exhibits 7 and 8. What possible relevance does the introduction of Peggy O'Neil's record have at the trial of Lee O'Neil? The clear purpose the introduction of such evidence was to prove the character of Defendant and to show that he acted in conformity therewith. The state did not want the jury to consider the actions of Lee O'Neil in a vacuum, but in the unfavorable light of his character. It is therefore violative of the Utah Rules of evidence and its use mandates reversal. Even if the evidence was otherwise admissible its unfair prejudice to Defendant clearly outweighed its probative value.

## II. OVERRULING OF JUDGE HALLIDAY'S EXCLUSION OF EVIDENCE BY JUDGE BUNNELL

The Seventh Judicial District in Utah is a multi-judge district. Subsequent to the October 28, 29 1991 trial with Co-Defendant Peggy O'Neil, and prior to the February 26, 28 1992 retrial, the Honorable Boyd Bunnell, as presiding judge for the Seventh District, replaced the Honorable Bruce K. Halliday with himself. He thereafter heard and ruled on motions and presided at the second trial.

The interim motions included both a request for reconsideration by the State of Judge Halliday's earlier exclusion of testimony and an objection by Defendant to the assignment of Judge Bunnell to the case and to the trial. Defendant urges upon this Court that the reversal of Judge

Halliday's Order by a judge with equal power is further reversible error.

"One judge should ordinarily hesitate to vacate, modify, or depart from an interlocutory order or ruling made in the same case by another judge with equal powers . . . A judge acting later in a case is, at most, bound only by the actual order or ruling announced by an earlier judge and not by the doctrine announced by the earlier judge in connection with his order or ruling." 46 Am Jur 2d Judges, Section 41, p. 123. (See also 48A C.J.S. Section 68, Judges).

Admittedly the above citation does allow for such overrulings in exceptional cases. Case law in Utah seems just as perplexed in rulings as to whether the ban against such overruling is absolute.

The better rule in Utah does favor the finality of the first ruling.

However, the prior denial of the motion to supplement the record is now the "law of the case" and we decline to reconsider that decision. There are sound policy considerations supporting the "law of the case" doctrine and the principle that a court should not reconsider and overrule a decision made by a co-equal court. Stiner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984). As Justice Zimmermann states:

One branch of what is generally termed the doctrine of "law of the case" has evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case. "[O]rdinarily one judge of the same court cannot properly overrule the decision of another judge of that court." Richardson v. Grand Central Corp., 572 P. 2d at 397.

Id. at 736. Cf. Daly v. Sprague, 742 F. 2d 896, 900 (5th Cir.1984) ("While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case . . . unless . . . the decision was clearly erroneous and would work a manifest injustice.")

The general Utah Rule is that generally one district and judge cannot overrule another district judge having identical authority and stature. State v. Beno, 645 P. 2d 44 (Utah 1982). See also State v. Lamper, 799 (2d 1125 (Utah 1989) and Mascaro v. Davis 741 P.2d 938 (Utah 1987), Turner v. Mecham, 537 P.2d 312 (Utah 1975).

The application of the law of the case doctrine is thus held applicable in criminal as well as civil matters in Utah as well as sister jurisdictions. Lamper, supra. See also State v. Holliday, 598 P2d 1132, 183 Mont 251 (1979); Bejarno v. State, 801 P2d 1388 (Nev 1990), State v. Sisneros, 647 P.2d 403, 98 N.M. 201, appeal after remand 687 P.2d 736, 101, N.M. 679 (1982); and State v. Paras, 630 P.2d 410, 52 Or. App. 1071, review denied 639 P.2d 1280, 291 Or. 662 (1980)

The application of the law of the case doctrine in criminal cases is the same as its application in civil cases: it forecloses relitigation when a ruling has been made in a case and the same issue arises a second time in the same case. In the present matter the issue of the non-admissability of Defendant's prior bad acts or convictions had been determined in his favor. The reversal of such ruling and the introduction of such facts to the jury by way of opening statement, exhibits and testimony

the jury by way of opening statement, exhibits and testimony constitute reversible error.

### III. SUBSTITUTION OF JUDGES

The presiding judge of a district is empowered by Rule 3-104 (E) (ii) of the Code of Judicial Administration to assign cases to provide for the equitable distribution of the workload and the prompt disposition of cases. Defendant urges that the presiding judge is not empowered to arbitrarily reassign judges once they have commenced an assignment on a criminal case; particularly when such reassignment leads to the change of a ruling favorable to Defendant made by the predecessor judge, or give the perception that that was the motive. At the time of the second trial replacement of a judge was regulated by Rule 29, Utah Rules of Criminal Procedure. Rule 29 provided in Subsection (a) for judicial replacement during trial, in Subsection (b) for judicial replacement after a verdict of guilty, and in Subsection (c) for judicial replacement at the behest of a party who felt bias or prejudice. It is important that the rule required the necessity of death, sickness or other disability, or action by a party before the presiding judge can make a reassignment. There is no arbitrary grant allowing a presiding judge to sua sponte disqualify or replace the assigned judge, nor was there at the time of reassignment.

The right of Defendant to be present and advised of personnel changes in his case has been recognized and codified



since at least 1990. Rule 4-604 of the Code of Judicial Administration does not allow the withdrawal of counsel unless the defendant is present in open court (with exceptions). While Defendant does not argue that the withdrawal of counsel is perfectly analogous to the substitution of a judge, the point is valid that Defendant should be advised and have input into the entire process of his trial.

The importance of the role of the defense in such changes is further exhibited in Rule 29A of the Utah Rules of Criminal Procedure. The rule recognizes Defendant's position that once a judge is assigned the defendant has some interest in that appointment. The notice of change of judge must be signed by Defendant. While Rule 29A was not effective until April 15, 1992, Defendants point that it exemplifies the recognition of a long-held belief of the Defendant's interest in judicial assignment is valid.

The assertion in the February 5, 1992 Ruling on Defendant's Objection to the reassignment of Judge Halliday (R-186), that a scheduling conflict mandated the change should not be used as a justification. No valid reasons exists for why the trial had to be scheduled on that date. Defendant also questions, considering the above rules, whether it was proper for judge Bunnell to rule on the Motion seeking his own disqualification, and whether such ruling comports with his right to a fair trial

The reassignment of the original trial judge was arbitrary and resulted in the reversal of a favorable ruling excluding

evidence. This Court should recognize Defendant's interest in the assigned judge and in that judge's ruling by reversing his conviction.

#### CONCLUSION

The State's case seeking to convict Defendant on a theory of accomplice liability based solely on his driving a motor vehicle is inherently weak. Without the improperly introduced evidence of prior criminal convictions and bad acts, there is a substantial likelihood of a more favorable result to Defendant. This court should reverse on those grounds.

DATED this 11 day of September, 1992.



---

William L. Schultz  
Attorney for Defendant

CERTIFICATE OF DELIVERY

I, William L. Schultz, certify that on September 11, 1992, I served four copies of the attached Appellants' Brief to the Utah General for the State of Utah, counsel for appellee in this matter, by mailing to him by first class mail with sufficient postage prepaid to the following address:

Attorney General  
State of Utah  
236 State Capitol Bldg.  
Salt Lake City, UT 84114

  
\_\_\_\_\_  
William L. Schultz

ADDENDUM

## RULE 403 U.R.E.

a. Rule 403 Exclusion of relevant evidence  
on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**RULE 404. Character evidence not admissible  
to prove conduct; exceptions; other crimes.**

(a) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a persistent trait of his character offered by an accused, or by the prosecution to rebut the same.

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rule 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 609 U.R.E.

Impeachment by evidence of conviction of crime.

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement regardless of the punishment.

RULE 3-104 (E)

(E) Docket management and case and judge assignments

(i) The presiding judge shall monitor the status of the dockets in the court and implement improved methods and systems of managing dockets.

(ii) The presiding judge shall assign cases and judges in accordance with supplemental court rules, to provide for an equitable distribution of the workload and the prompt disposition of cases.



**RULE 4-604 Withdrawal of counsel  
in criminal and delinquency cases.**

**Intent:**

To establish a uniform procedure for withdrawal of counsel in criminal cases.

**Applicability:**

This rule shall apply to all trial courts of record and not of record

**Statement of the Rule:**

(1) Withdrawal of counsel prior to the entry of judgment.

(A) Consistent with the Rules of Professional Conduct, an attorney may not withdraw as counsel of record in criminal cases without the approval of the court.

(B) A motion to withdraw as an attorney in a criminal case shall be made in open court with the defendant present unless otherwise ordered by the court.

FILED

APR 14 92

SEVENTH DISTRICT COURT  
STATE OF UTAH

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR GRAND COUNTY, STATE OF UTAH

Criminal No. 91-24

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Held in the Courtroom of said Court, at Moab, Grand County, State of Utah, on the 13th day of April, 1992, present the Honorable Boyd Bunnell, District Court Judge.

THE STATE OF UTAH,

Against: **ALFRED LEE O'NEIL**

JUDGMENT AND COMMITMENT TO UTAH STATE PRISON

---

Lyle R. Anderson, for Plaintiff

William L. Schultz, for Defendant

This being the day and hour fixed for pronouncing judgment in this case, and the defendant being present in Court and represented by counsel, and defendant having heretofore been found guilty by a jury of the crimes of:

**COUNT I: DISTRIBUTION OF A CONTROLLED SUBSTANCE, a FIRST DEGREE FELONY**, in violation of Section 58-37-8(1)(a), Utah Code Annotated, 1953 as amended;

**COUNT II: DISTRIBUTION OF A CONTROLLED SUBSTANCE, a FIRST DEGREE FELONY**, in violation of Section 58-37-8(1)(a), Utah Code Annotated, 1953 as amended;

COUNT III: DISTRIBUTION OF A CONTROLLED SUBSTANCE, a FIRST DEGREE FELONY, in violation of Section 58-37-8(1)(a), Utah Code Annotated, 1953 as amended;

and the defendant stating to the Court that he has no legal reason to advance why judgment should not be pronounced, the Court now pronounces the judgment and sentence of the law as follows, to-wit:

That you, ALFRED LEE O'NEIL, be imprisoned in the State Prison of the State of Utah, in the County of Salt Lake, for a term of **NOT LESS THAN FIVE (5) YEARS AND MAY BE FOR LIFE** on Count I; that you be imprisoned in the State Prison of the State of Utah, in the County of Salt Lake, for a term of **NOT LESS THAN FIVE (5) YEARS AND MAY BE FOR LIFE** on Count II; and that you be imprisoned in the State Prison of the State of Utah, in the County of Salt Lake, for a term of **NOT LESS THAN FIVE (5) YEARS AND MAY BE FOR LIFE** on Count III. The Court orders said prison terms to run concurrent.

You are further ordered to pay restitution to the Four Corners Narcotic's Strike Force in the amount of \$260.00.

You, ALFRED LEE O'NEIL, are hereby remanded to the custody of the Sheriff or other proper officer of the Grand

County Jail of the State of Utah for transfer to the custody of  
the Utah State Prison.

DATED this 13 day of April, 1992.

BY THE COURT:

Lyle R. Anderson  
Lyle R. Anderson  
Grand County Attorney

Boyd Bunnell  
Boyd Bunnell  
District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that on the 14 day of April, 1992, I  
hand delivered or mailed, postage prepaid, a true and correct  
copy of the above to William L. Schultz, Attorney for Defendant,  
76 S. Main, #6, Moab, Utah 84532 and Wendell Thayne, Adult  
Probation and Parole, #6 South 100 East, Moab, Utah 84532.

Quinn Mawar

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY  
STATE OF UTAH

Criminal No. 91-24

Defendant has filed a Motion in Limine moving the Court for an order excluding certain anticipated evidence. The Motion asks the Court to speculate as to what may be offered by the State, and is not supported by anything other than counsel's allegations.

THEREFORE, the Motion in Limine is denied.

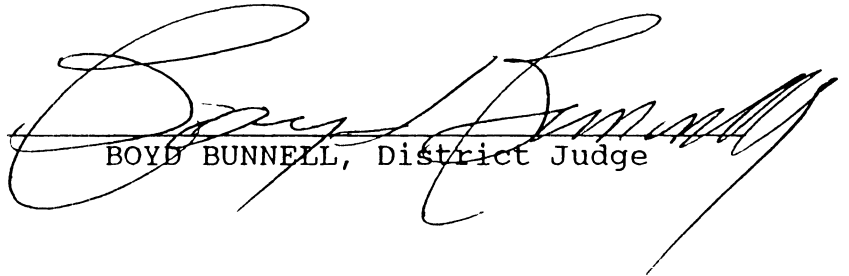
The Defendant also objects to this case being tried by the undersigned Judge. The Motion offers no legal grounds for disqualification, or any other reason for the undersigned not proceeding with this matter.

As Presiding Judge, the undersigned has the right and obligation to assign judges within the District to specific cases at any time in order to move matters to conclusion and to best utilize judges' time.

Judge Halliday has been assigned the trial of a criminal case in Emery County on the same date that this case is set for trial. The assignments are made in a random manner and have nothing to do with persons or subject matters.

THEREFORE, the Motion to Disqualify is denied.

DATED this 5<sup>TH</sup> day of February, 1992.

  
BOYD BUNNELL, District Judge